IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. 375.

MIDLAND VALLEY RAILROAD COMPANY,

Petitioner,

vs.

PHILIP BARKLEY ET AL., Respondents.

BRIEF OF RESPONDENTS ON THE MERITS.

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vs.

THOMAS BARKLEY ET AL., RESPONDENTS.

BRIEF OF RESPONDENTS ON THE MERITS.

No right of the petitioner under the Act of Congress approved February 28, 1920, plead by the petitioner, was denied to the petitioner in this case either by the trial court or by the Supreme Court of the State of Arkansas.

Sections 895 and 915 of Crawford & Moses' Digest of the Statutes of the State of Arkansas were not involved in the trial of this cause in the trial court nor

were they involved in the questions determined by the Supreme Court of Arkansas in this case.

The Supreme Court of Arkansas did not hold that the respondents were entitled to anything under said sections of the Arkansas statutes and did not hold against any act of Congress in favor of the statutes of Arkansas.

The complaint of the respondents filed in the Circuit Court of the State of Arkansas is found at pages 1-4 of the printed record.

A paragraph of the complaint is as follows:

> "Plaintiffs performed a great amount of development work in said mine at heavy expense to themselves and purchased and placed therein a large quantity of machinery and equipment in order to put said mine in condition for profitable operation during the term of their lease.
>
> "In the latter part of June, 1922, at a time when plaintiffs had developed said mine to the point that it could be profitably worked during the remainder of the term of plaintiffs' lease, the defendant through its agent one Tyler demanded of plaintiffs that plaintiffs sell and turn over to defendant the output of coal from their said mine at the price of $3.55 per ton when coal was bringing on the open market much more than that price, and defendant, through its said agent, Tyler, threatened plaintiffs that if plaintiffs failed to sell and deliver to the defendant the coal from their said mine at said price the defendant would fail and refuse to furnish plaintiffs with coal cars in which to ship the output of their coal mine and that thereby plaintiffs' coal mine would be compelled to shut down.

> Plaintiffs refused to sell and deliver to the defendant their coal at the price as demanded and thereafter the defendant wrongfully failed and refused to furnish plaintiffs coal cars in which to ship the coal from their said mine, although the plaintiffs duly requested the defendant so to do." P. R. 2.

It is thus seen that the gravamen of the respondents' claim against the petitioner in the court of the first instance had nothing whatever to do with any administrative question. The question involved in the case was purely a judicial question, a question entirely within the jurisdiction of the State trial court.

If the question involved in the case had been an administrative question, this would have been beyond the jurisdiction of the court, but such is not the case.

If the question involved had been one with reference to the distribution of coal cars on the Midland Valley Railroad and the Interstate Commerce Commission had made an order with reference thereto and this order had been attacked by the respondents in their suit the court would have had no jurisdiction.

The petitioner put in evidence a great number of orders of the Interstate Commerce Commission, and these are found in the printed record, pages 233-288. None of these orders have any application to the Midland Valley Railroad Company and none of them cover any operations of the Midland Valley Railroad Company during the time in question, or profess to do so.

Respondents in their brief in the Supreme Court of Arkansas set forth a letter from the Interstate Commerce Commission which said that the Interstate Com-

a penalty is attached for failure to comply with this provision.

Under paragraph 13 the Interstate Commerce Commission is authorized to order any or all carriers by railroad subject to the act to file with the Commission from time to time their rules and regulations with respect to car service, which rules and regulations shall be incorporated in their schedules, showing rates, fares and charges for transportation, and making the carrier subject to all provisions of the act.

Under paragraph No. 14, the Commission may, after hearing on a complaint, or upon its own initiative, establish reasonable rules, regulations and practices with respect to car service by railroads subject to the act, and prescribe a penalty for nonobservance of these rules, etc.

Under paragraph 15, whenever the Commission is of the opinion that shortage of equipment, congestion of traffic, or other emergency, with or without complaint, or on its own initiative and with or without notice to the carrier and without hearing or filing of report, it is empowered (2) to suspend the operation of any or all rules, regulations, or practices then established with respect to car service for such time as may be determined by the Commission; (*b*) to make such just and reasonable directions with respect to car service without regard to the ownership as between carriers of locomotives, cars and other vehicles, during such emergency as in its opinion will best promote the service in the interest of the public and the commerce of the

people, upon such terms of compensation as between the carriers as they may agree upon, or in the event of their disagreement as the Commission may, after subsequent hearing, find to be just and reasonable, etc., U. S. Statutes at Large, Vol. 41, Chp. 91, pg. 476, Sec. 402.

By an act of Congress, September 22, 1922, U. S. Statutes at Large, Vol 42, p. 1025, an act was again passed entitled "An act to declare a national emergency to exist in the production, transportation and distribution of coal and other fuel, granting additional powers to the Interstate Commerce Commission providing for the appointment of a Federal Fuel Distributor, providing for the declaration of car service priorities during the present emergency, etc." Section 2, provides in part as follows:

> "That the powers of the Interstate Commerce Commission under the act entitled 'An Act to regulate commerce' approved February 4, 1887, as amended, including the Transportation Act, 1920, and especially under Sec. 402 of said Transportation Act, 1920, are, during the aforesaid emergency, enlarged to include the authority to issue in transportation of coal or other fuel orders for priorities in car service, embargoes, and other suitable measures in favor of, or against any carrier, * * * and to take any other necessary and appropriate steps for the priority in transportation and for the equitable distribution of coal or other fuel so as best to meet the emergency and to promote the general welfare, and to prevent upon the part of any person, partnership, association, or

> corporation, the purchase or sale of coal or other fuel at prices unjustly or unreasonably high. This act shall not be construed as repealing any of the powers heretofore granted by law to the Interstate Commerce Commission, but shall be construed as conferring supplementary and additional powers to said Commission, and as an amendment to Section 1 of the Interstate Commerce Act and subject to the limitations and definitions of commerce controlled by said act and all powers given said Interstate Commerce Commission, shall be applicable to the execution of this act."

Learned counsel for the appellant contend that it was the purpose of Congress in the above enactments to vest the Interstate Commerce Commission with supreme power in the matter of distribution of coal cars regardless of whether the coal was to be shipped in intra or interstate commerce. Counsel for appellant say:

> "It is the contention of the defendant that all State statutes and common-law obligations are swept away, as far as the transportation of coal, or the furnishing of cars, in which to transport the same, by the provisions of the Transportation Act, and the later Emergency Act of September 22, 1922."

We can not agree with counsel in this contention.

Section 8 of the Interstate Commerce Act, Vol. 24, Statutes at Large, p. 379, Supp. to Revised Statutes of the United States, 529, provides as follows:

> "That in case any common carrier subject to the provisions of this act shall do, cause to be done, or permit to be done, any act, matter or thing in this act prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this act required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this act, etc."

Section 9 provides that

> "Any person or persons claiming to be damaged by any common carrier subject to the provisions of this act may either make complaint to the Commission, as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this act, in any district or circuit court of the United States of competent jurisdiction."

Section 22, provides in part as follows:

> "And nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies."

These provisions of the Interstate Commerce Act approved February 4, 1887, were not repealed expressly or by implication by the provisions of the Transportation Act of Congress of February 8, 1920, and the Emergency Act of September 22, 1922, upon which counsel for appellant relies. On the contrary, the

above provisions of Sections 8, 9 and 22 of the Inter-State Commerce Act were in full force and effect when appellees' cause of action is alleged to have accrued. Counsel for the appellees concede that the cars which it is alleged appellant failed to furnish were ordered for and to be used in interstate shipments. Such being the case, the provisions of Section 22 of the Interstate Commerce Act, *supra,* confers jurisdiction upon the State court. The question, we believe, is thoroughly settled against the contention of counsel for the appellant by decisions of the Supreme Court of the United States.

In *Pennsylvania Railroad Co. v. Puritan Coal Mining Co.*, 237 U. S., 121, Mr. Justice Lamar, speaking for the court, said:

> "But Sections 8 and 9 standing alone, might have been construed to give Federal courts exclusive jurisdiction of all suits for damages occasioned by the carrier violating any of the old duties which were preserved and the new obligations which were imposed by the Commerce Act. And, evidently for the purpose of preventing such a result, the proviso to Section 22 declared that 'nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies.' * * * But for this proviso to Section 22 it might have been claimed that, Congress having entered the field, the whole subject of liability of carrier to shippers in interstate commerce had been withdrawn from the jurisdiction of the State courts, and this clause was

> added to indicate that the Commerce Act, in giving rights of action in Federal courts, was not intended to deprive the State courts of their general and concurrent jurisdiction. It was further declared in that case concerning Sections 8, 9 and 22 of the Interstate Commerce Act construing the same as a whole, that 'it did not supersede the jurisdiction of State courts in any case new or old, where the decision did not involve the determination of matters calling for the exercise of the administrative power and discretion of the Commission, or relate to a subject as to which the jurisdiction of the Federal courts had otherwise been made exclusive.'"

And in the case of *Pennsylvania Railroad Company v. Sonman Shaft Coal Co.*, 242 U. S., 120, Mr. Justice Van Devanter, speaking for the court, among other things, said:

> "Thus we have held that a manifest purpose of the provision in Section 22 is to make it plain that such 'appropriate common-law and statutory remedies' as can be enforced consistently with the scheme and purpose of the act are not abrogated or displaced."

Then, after reviewing and reiterating the doctrine of the above case of *Railroad Co. v. Puritan Coal Company, supra,* and other cases, he further says:

> "Applying these rulings to the case in hand, we are of the opinion that a State court could entertain the action consistently with the Interstate Commerce Act. Not only does the pro-

vision in Section 22 make strongly for this conclusion, but a survey of the scheme of the act and of what it is intended to accomplish discloses no real support for the opposing view."

In *Texas & Pacific Railway Company v. Abilene Cotton Oil Co.*, 204 U. S., 426, at page 446, Chief Justice White, speaking for the court, concerning Section 22 of the Interstate Commerce Act, *supra*, said:

"This clause, however, cannot be construed as continuing in shippers a common-law right, a continued existence of which would be absolutely inconsistent with the provisions of the act. In other words, the act cannot destroy itself. The clause is concerned alone with rights recognized in or duties imposed by the act, and the manifest purpose of the provision in question was to make plain the intention that any specific remedy given by the act should be regarded as cumulative when other appropriate common-law or statutory remedies existed for the redress of the particular grievance or wrong dealt with in the act."

"* * * The appellant sets up in his answer and makes an exhibit thereto various orders and rules of the Interstate Commerce Commission and the rules adopted by the United States Railroad Administration, relating to the supply and distribution of coal cars, which were in effect during the period covered by the appellees' action. We deem it wholly unnecessary to set out and comment upon these rules and the authority upon which the appellant relies to support its contention that the State court was without jurisdiction. We have examined all

these rules and considered the authorities, and especially the decision of the Interstate Commerce Commission in the case of *Interstate Commerce Commission v. Victor American Fuel Co.* and *Salt Lake Railroad Co.*, of July 20, 1926, and we are convinced that these authorities have no application. As we construe the complaint, no attack is made by the appellees upon the rules and orders of the Interstate Commerce Commission relating to the supply and distribution of cars by railroads for the shipment of coal. We cannot discover in the complaint any allegation to the effect that the rules and orders of the Interstate Commerce Commission are unreasonable or unfair, that these rules themselves result in unlawful or unreasonable practice or in unjust discrimination or undue prejudice to shippers. That would involve an administrative question over which the Interstate Commission alone would have jurisdiction."

As is said in *Pennsylvania Railroad Co. v. Puritan Coal Co., supra,* at page 131:

"In a suit where the rule of practice itself is attacked as unfair or discriminatory, a question is raised which calls for the exercise of the judgment and discretion of the administrative power which has been vested by Congress in the Commission. It is for that body to say whether such a rule unjustly discriminates against one class of shippers in favor of another. Until that body has declared the practice to be discriminatory and unjust no court has jurisdiction of a suit against an Interstate carrier for damages occasioned by its enforcement. * * * But if the carrier's rule, fair on its face, has been un-

> equally applied, and the suit is for damages occasioned by its violation or discriminatory enforcement, there is no administrative question involved, the court being called on to decide a mere question of fact as to whether the carrier has violated the rule to plaintiff's damage. Such suits, though against an Interstate carrier for damages arising in Interstate Commerce may be prosecuted either in the State or Federal courts."

The Interstate Commerce Law which we have quoted above makes it the duty of carriers by railroads to make just and reasonable distribution of cars for transportation of coal among the coal mines served by such carrier, and when the supply of cars available for service does not equal the requirements of the mines, it is the duty of the carrier to maintain and apply just and reasonable ratings of such mines and count against such mines each and every car furnished for transportation of coal. It is the duty of the carrier under the Interstate Commerce Act to furnish safe and adequate car service and to establish, observe and enforce just and reasonable rules, regulations and practices with respect to car service.

This is purely an action against the appellant company for its failure to furnish cars, which is its common law and statutory duty, both Federal and State. But the allegations of this complaint show that this action is bottomed upon appellant's alleged failure to comply with its common-law or contractual, as well as statutory duty to furnish cars under Sections 895 and 915, C. & M. Digest.

According to the above decisions of the United States Supreme Court and our own court, appellee had the right to maintain this action under Section 22 of the Interstate Commerce Act. It follows that the court did not err in overruling the appellant's demurrer to the complaint. P. R., 350-357.

It is thus seen that the complaint in this case alleges a violation of the statutory and common-law duty of the respondents by the petitioner and that the right to maintain the action was sustained under Section 22 of the Interstate Commerce Act.

It will also be seen that this case does not call for the decision of any question as between a State statute or a common-law liability and an act of Congress.

It was conceded in the Supreme Court of Arkansas by the respondents, as shown by the opinion of that court, that the right of the respondents to recover was to be determined by the Federal law. The Supreme Court of Arkansas affirmed the right of respondents to recover under the Federal law.

The right to recover under the Federal law by a suit in a State court had been declared over and over again in repeated decisions of the Supreme Court of the United States. These decisions of the Supreme Court of the United States were followed by the Supreme Court of Arkansas in its decision in this case. There is no new question in this case to be determined by this Court. The only question in this case, the question of the jurisdiction of the State court to try this suit for damages, has been repeatedly decided by this Court.

The brief of the petitioner on the merits has little

in it other than was contained in its brief on the petition for writ of certiorari. The same authorities for the most part are cited, quoted from and relied on.

There is the additional authority cited in the brief on the merits of L. & N. R. R. Co. *v.* Brashear *et al.*, decided by the Court of Appeals of Kentucky in December, 1926, and modified in February, 1927. It is found in 289 S. W., 1094.

That case does not furnish any support for the contention of petitioner herein. That was a case where a suit was brought under a State statute and not under the common law and the Act of Congress.

The third syllabus of the case is as follows:

> "Action against interstate carrier for damages for failure to furnish 100 per cent supply of coal cars, as required by Ky. St., Sec. 783, should have been dismissed for want of jurisdiction in circuit court, on showing that the cars demanded were instrumentalities of interstate commerce, and that defendant furnished more than plaintiffs' *pro rata* supply of cars under rules of Interstate Commerce Commission."

That was a suit based entirely upon a State statute and not upon the common-law liability or upon the Act of Congress.

An examination of that case will disclose that its holding is not contrary to the holding of the Supreme Court of Arkansas in the case now before the court.

There appears to be some effort by the petitioner in this case to show to the court that this is a suit based upon certain sections of the Arkansas statutes and not

upon the common-law liability of the carrier and the Federal statutes pertinent thereto.

The complaint is not based upon the statutes of Arkansas. The case was tried and decided in the trial court and in the Supreme Court of Arkansas under the common-law liability and the applicable provisions of the Federal statutes.

We have inserted in a former portion of this brief a quotation from the complaint which shows what the claim of the respondents was and is.

Instructions given by the trial court at the request of the respondents show what the claim of respondents was and is.

The instructions given by the trial court at the request of the respondents are found at pages 325-7 of the printed record.

Four of the instructions there set out are as follows:

> 1. "If the defendant failed, neglected or refused to furnish plaintiffs with coal cars in which to ship the output of their coal mine because the plaintiffs refused to sell the defendant coal from their mine at a price less than the market price of said coal, and plaintiffs were damaged by such refusal on the part of the defendant, your verdict should be for the plaintiffs."

Instruction 2 so given is as follows:

> "If the defendant wrongfully failed, neglected or refused to furnish plaintiffs, upon proper requests therefor by them, coal cars in which to ship the output of their coal mine, and plaintiffs were damaged by such refusal, your verdict should be for the plaintiffs."

Instruction 3 so given is as follows:

> "As a common carrier of coal in car lots the law and Interstate Commerce Commission required the defendant to provide itself with and to furnish upon proper requests therefor to shippers of coal in car lots on its line a sufficient number of suitable cars in which to ship the coal on its line in accordance with the Commission's rule of distribution which was ordinarily and usually offered for shipment, and also to anticipate and provide for all such increased shipments of coal on its line as by the exercise of ordinary care and prudence it could anticipate and provide for."

The fourth instruction so given is as follows:

> "If you find for the plaintiffs you will find in their favor such an amount as will fairly compensate them under the evidence for the damages, if any, which have proximately resulted to the plaintiffs from the failure to furnish cars as set forth in the complaint."

The second instruction requested by the petitioner and given by the trial court is as follows:

> "The court instructs you that the burden of proof in this case rests upon the plaintiffs to show that the orders of the Interstate Commerce Commission made under and pursuant to the Acts of Congress vesting jurisdiction in the Interstate Commerce Commission in the matter of the distribution of available coal car supply were violated by the defendant, and unless you find that such orders were so violated then, un-

der the law, it will be your duty to return a verdict for the defendant railroad company." P. R., 328.

Instruction 3 asked by the petitioner and modified and given by the court is as follows:

> "The court instructs you that under the Act of Congress approved February 28, 1920, commonly known as the Transportation Act, that the manner of the distribution of the available coal car supply was vested in the Interstate Commerce Commission, and the said Interstate Commerce Commission was given, under said Act of Congress, the power and authority to adopt rules and regulations with reference to the distribution of said coal car supply, and therefore the burden would be upon the plaintiffs to establish that the rules and regulations adopted by the Interstate Commerce Commission pursuant to said power and authority given by the Act of Congress were violated, and if the proof fails to show any violation of the said Act of Congress or of the rules and regulations of the Interstate Commerce Commission your verdict should be for the defendant railroad company." P. R., 331.

The only modification made by the court in this instruction as asked by the petitioner is that it changed the word "as" in the instruction as requested by respondent to "if" in the fifth line from the bottom, and added the words "railroad company" after the word "defendant" at the end of the instruction.

Instruction 13 was asked by the petitioner and after slight modification was given as follows:

> "The court instructs you that even if the law of the State of Arkansas was applicable that under Section 895 of the statutes of Arkansas it is provided that a shipper must make written application to the station agent of the railroad company for a car or cars to be loaded with any kind of freight embraced in the tariff of said company, stating in said application the character of the freight and its final destination, and that the railroad company shall furnish same at the place of shipment within six days from seven o'clock a. m. the day following such application, and if it appears from the evidence that the plaintiffs failed to comply with this section of the statute of Arkansas with reference to making a demand for cars, if it was applicable, the plaintiffs could not recover and your verdict should be for the defendant." P. R., 334.

The proof in the record shows conclusively that no effort was made to comply with the statutes of the State of Arkansas applicable to demand for cars. The only demand for cars was a demand made in writing as provided for and required by a rule of the Interstate Commerce Commission. A great portion of the record is taken up with these matters, but nowhere in the record is there any proof that there was any effort to demand cars as required by Section 895 of the Arkansas statutes. The whole question of the demand for cars was under the rule of the Interstate Commerce Commission.

Section 895 of the statutes of Arkansas referred to by counsel does not require the furnishing of one hundred per cent of the cars demanded as provided for in

that section. The same rule of construction with reference to the furnishing of cars under the Arkansas statute is followed as is followed by this Court in the many cases that have been before it.

The carrier is required to furnish without discrimination cars to the respective shippers in due proportion to their needs and calls.

The case now before the court though is not one that arose under the Arkansas statute or under any construction of the Arkansas statutes.

Section 895 of the Arkansas statutes applies only to the case where a shipper makes a written application to the station agent of the railroad company for a car or cars, to be loaded with any kind of freight embraced in the tariff of the company, stating in said application the character of the freight and its final destination, and said section requires when such application is made that the railroad company furnish the cars at the place of shipment within six days from 7 o'clock a. m. of the day following such application.

No demand for cars was made under this section and no attempt to follow it and no right was asserted or contended for under it.

Section 915 of the Arkansas statutes referred to is a section which requires the Arkansas Railroad Commission to formulate rules for the furnishing of cars by railroad companies to shippers.

So these sections of the Arkansas statute were not applicable and were not applied in the case now before the court. No recovery in this case could possibly have been had under the Arkansas statute and the Arkansas

statute requires the Arkansas Railroad Commission to formulate rules for the furnishing of cars by railroad companies to shippers after the same fashion that the Federal statute requires the Interstate Commerce Commission to formulate rules for the furnishing of cars to shippers.

It thus conclusively appears that the Arkansas Supreme Court did not ground its decision in this case upon any State statute and that its decision is based upon the complaint made, the verdict rendered and the provisions of the Federal law.

The paragraph of the complaint copied in this brief shows that the respondents grounded their right of action in this case on the arbitrary refusal of the petitioner to furnish respondents with coal cars in which to ship the output of their mine, which refusal of the petitioner to so furnish coal cars was made because the respondents would not sell to the petitioner the output of the mine at a fixed price as demanded by one Tyler, the agent of the petitioner.

The battle in the trial court was fought around this proposition and the claim of the petitioner that it had complied with the rules of the Interstate Commerce Commission in furnishing cars to respondent.

These questions of fact were settled by the verdict of the jury in favor of the respondents and against the petitioner.

No question of jurisdiction could arise on the complaint filed by respondents.

The Circuit Court for the Greenwood District of Sebastian County, Arkansas, had jurisdiction of the mat-

ters involved in this controversy, according to the decisions of the Supreme Court of the United States prior to the enactment of the Transportation Act of 1920 and the Emergency Act of 1922.

There is nothing in either of these acts which changes the Federal law on the question of jurisdiction.

Counsel for petitioner fails to cite any provision in either of these Acts of 1920 and 1922 which deprives the courts of jurisdiction to try this case. We feel certain that there is no provision in either of these acts which prevents the courts from exercising jurisdiction in this class of cases.

We respectfully submit that the circuit court had jurisdiction of this cause and that the Supreme Court of Arkansas was right in affirming the decision of the circuit court, and we respectfully submit that the decision of the Supreme Court of Arkansas in this case should be affirmed by this Court.

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